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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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# No. 449

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MARDEN & MURPHY, INC.,

*Appellant,*

*vs.*

CITY OF LOWELL, MIDDLESEX COUNTY, MASSACHUSETTS

---

APPEAL FROM THE LAND COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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## STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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P. Harold Ready,
Raymond D. O'Brien,
*Counsel for Appellee.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 449

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MARDEN & MURPHY, INC.,

*Appellant,*

*vs.*

CITY OF LOWELL,

*Appellee.*

---

## MOTION TO DISMISS OR AFFIRM

---

Now comes the City of Lowell, the appellee in the above-entitled appeal, and moves that said appeal be dismissed, or the decision and decree appealed from be affirmed, for the reasons set forth in the appellee's Statement Opposing Jurisdictional Statement filed herewith.

CITY OF LOWELL,
By P. HAROLD READY,
*City Solicitor,*
and
RAYMOND D. O'BRIEN,
*Attorney.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

# No. 449

MARDEN & MURPHY, INC.,

*Appellant,*

*vs.*

CITY OF LOWELL,

*Appellee.*

## STATEMENT OPPOSING JURISDICTION

The City of Lowell, appellee in the above-entitled appeal, believing that the matter set forth below will demonstrate that its motion to dismiss or affirm should be allowed files this, its statement in opposition to Appellant's statement as to jurisdiction.

This case arises from a petition filed in the Massachusetts Land Court by the City of Lowell for the foreclosure of all right of redemption under four tax titles acquired by that city in August, 1942, for the nonpayment of the taxes assessed in the years 1933 to 1941, inclusive, upon four parcels of real estate in Lowell, Massachusetts. Marden & Murphy, Inc., the owner of the four parcels, answered, denying the validity of the tax titles. From a decision of the Land Court holding the tax title on the first parcel to be invalid but the tax titles on the other parcels to be

valid, both the City of Lowell and Marden & Murphy, Inc. appealed to the Supreme Judicial Court of Massachusetts, which affirmed the decision of the Land Court. The appeal now before this Honorable Court was taken by Marden & Murphy, Inc. from the decree entered by the Land Court upon receipt of the Supreme Judicial Court's rescript.

I

**Appellee's motion to dismiss or affirm should be allowed as to Parcel 1 (in the original petition to foreclose) because the original petition to foreclose has been dismissed as to that parcel.**

The decision of both the Land Court and the Supreme Judicial Court as to Parcel 1 was in favor of the appellant and held the City's tax title thereon to be invalid; and the Land Court's final decree dismisses the City's petition to foreclose as to said Parcel 1. The appellant is therefore not a party aggrieved in this respect and is not entitled to prosecute this appeal as to that parcel. *New York Telephone Company* v. *Maltbie,* 291 U. S. 645. *Lindheimer* v. *Illinois Bell Telephone Company,* 292 U. S. 151, 176.

If the City of Lowell proceeds to acquire a new tax title on Parcel 1, as appellant in its statement favoring jurisdiction suggests, the new tax title will be the basis of a new petition for foreclosure and hence a new and separate court action which appellant can defend and, if aggrieved, appeal.

II

**Appellee's motion to dismiss or affirm should be allowed as to Parcel 4 (in the original petition to foreclose) because none of the errors assigned by the appellant relate to Parcel 4.**

The Assignment of Errors filed with the appeal in the instant cause relate to Parcels 1, 2 and 3, but not to Parcel

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4. The prayer at the end of the Petition for Appeal asks for no relief as to Parcel 4. We submit that it follows that appellee's motion to dismiss should be allowed as to parcel 4.

## III

**Appellee's motion to dismiss or affirm should be allowed insofar as the appeal attacks assessments for the years 1933 to 1941, inclusive, on the ground that the action of the local assessors violated the appellant's rights under the Fourteenth Amendment.**

The Assignment of Errors accompanying the appeal of Marden & Murphy, Inc. to this Court sets forth some fourteen alleged errors. Generally speaking, the alleged errors may be said to fall into two categories: (1) those which attack the validity of certain 1938 and 1939 taxes on the ground that Mass. St. 1938, c. 478, violates the Fourteenth Amendment to the Constitution of the United States, and (2) those (Nos. 9, 10, 11 and 12) which attack certain assessments for the years 1933 to 1941, inclusive, on the ground that the action of the local assessors violated the Appellant's rights under the Fourteenth Amendment.

The latter do not attack any State statute as repugnant to the Federal Constitution, but are directed simply against the administration of State statutes. As was said by this Court in *Charleston Federal Savings and Loan Association* v. *Alderson*, 324 U. S. 182, 187, an appeal under Section 237 (a) of the Judicial Code (and the instant one is such) may be dismissed where the appellant fails to attack a statute explicitly in its assignment of errors.

Treating the paper on which the appeal was allowed as a petition for a writ of certiorari, certiorari should not be granted as to Nos. 9, 10, 11 and 12 in the Assignment of Errors. Appellant's jurisdictional statement does not argue

that it should, but is peculiarly silent with respect to these alleged errors. Under the heading "The Statutory Provisions as they existed before St. 1938, c. 478," however, appellant's jurisdictional statement does state with reference to remedies available with respect to taxes for 1933 to 1937, inclusive: "It is not questioned but that these remedies were fair and adequate." The Record (p. 26) shows that the assessments for the years 1936 and 1937 were reduced by the Board of Tax Appeals, that in 1940 and 1941 a reduction of the assessment was agreed to by the parties and confirmed by the Appellate Tax Board, and that Marden & Murphy, Inc. admitted before the Land Court that it has no cause for complaint of over-valuation in those years. Further, the Land Court found that land which had been valued by the Assessors at seventy-five cents a square foot had been over-valued at the most not more than twenty cents a square foot. R., pp. 24, 26. To value land worth fifty-five cents a square foot or more, at seventy-five cents a square foot is certainly not confiscation. Where real estate values are involved, two equally conscientious and honest experts have often been known to vary far more than twenty cents a square foot. To sum up, appellant's remedies with respect to 1933, 1934, 1935, 1936 and 1937 were fair and adequate upon its own admission. With respect to 1938 and 1939 the action of the local assessors was not confiscatory but fully within the realm of honest difference of opinion as to value. In the Appellate Tax Board proceedings the appellant agreed to the 1940 and 1941 values it now seeks to contest. Under the circumstances, we submit, certiorari should not be granted as to Nos. 9, 10, 11 and 12 in the Assignment of Errors.

Appellant's jurisdictional statement cites two opinions of this Court: *Ohio Valley Water Co.* v. *Ben Avon Borough*, 254 U. S. 287, and *Chicago, Burlington & Quincy Railroad*

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*Co.* v. *Osborne*, 265 U. S. 14. In the *Ohio Valley Water Co.* case, which was a utility rate case, this Court said:

> "In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to other law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."

The case at bar concerns the ordinary annual tax upon real estate, not the rates of a utility company. When this class of taxes has been involved, the proceedings have been construed with the utmost liberality and have been held to violate the Fourteenth Amendment only where they are arbitrary, oppressive or unjust. *Glidden* v. *Harrington*, 189 U. S. 255, 258. Further, the Land Court in the present case did not exclude evidence of value, but considered it and made findings with respect to it to which attention has already been called (R., pp. 24, 26). The Land Court found the twenty-cent variance to be a mere over-valuation, the exclusive remedy for which was by proceeding by abatement (R. p. 26). Thus, in the case at bar, a judicial tribunal did determine upon its own independent judgment as to both law and facts whether the taxes were confiscatory.

*Chicago, Burlington & Quincy Railroad Co.* v. *Osborne*, 265 U. S. 14, arose upon a bill in equity brought in a District Court of the United States to restrain the collection of taxes assessed under State statutes. There was no provision in the State statutes by which the person assessed could pay under protest and bring an action at law. The only remedy given by those statutes was a writ of error to take to the State Supreme Court a record prepared by the assessing board. In Massachusetts, several remedies are available to a taxpayer whose complaint is that a tax is wholly illegal. He

may pay the tax under a written protest and bring an action against the municipality to recover back the money paid (Mass. G. L. (Ter. Ed.) c. 60, s. 98); or he may set up the illegality as a defense to an action by the tax collector. *Harrington* v. *Glidden*, 179 Mass. 486, 492. There may even be other remedies such as an action of tort against the assessors where such an action will lie. *Harrington* v. *Glidden*, 179 Mass. 486, 492. Thus, the system of taxation condemned in the *Osborn* case is so entirely different from that in Massachusetts, that the *Osborne* case cannot be said to indicate that a substantial Federal question is presented by the case at bar. Furthermore, the question in the *Osborne* case was not whether the State system of taxation was constitutional, but whether a Federal court should exercise equity jurisdiction in a particular situation and issue a preliminary injunction. The test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the State courts. *Risty* v. *Chicago, Rock Island & Pacific Railway Co.*, 270 U. S. 378, 388, citing the *Osborn* case. We, therefore, respectfully submit that neither of the cases cited by the appellant militates against appellee's position on alleged errors Nos. 9, 10, 11 and 12.

## IV

**Appellee's motion to dismiss or affirm should be allowed insofar as appeal relates to St. 1938, c. 478, because the jurisdictional statement fails to show that the nature of the case is such as to bring the case within the jurisdictional provisions relied on.**

Rule 12 of the Rules of this Court relates to jurisdictional statements. Paragraph 1 of that rule provides in part as follows:

> "The statement shall show that the nature of the case and the rulings of the court were such as to bring

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the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain jurisdiction."

St. 1938, c. 478, requires payment as a condition precedent to an appeal to the Appellate Tax Board (of Massachusetts) with respect to a tax on personal property and with respect to a tax of more than one thousand dollars on a parcel of real estate. Under the statute cited, such an appeal may be taken with respect to a tax of not more than one thousand dollars on a parcel of real estate even though no part of the tax has been paid. The appellant's jurisdictional statement does not show that the 1938 and 1939 taxes which are involved in the instant appeal are more than $1,000 on any parcel of real estate. We, therefore, respectfully suggest that the appellant has failed to comply with the above-quoted provision of Rule 12.

V

**Appellee's motion to dismiss or affirm should be allowed insofar as appeal relates to St. 1938, c. 478, because the jurisdictional statement does not have appended to it earlier opinions, reference to which is necessary to ascertain the grounds of the decree.**

Paragraph 1 of Rule 12 of the Rules of this Court further provides in part as follows:

> "The applicant shall append to the statement a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including earlier opinions in the same case, or opinions in companion cases, reference to which may be necessary to ascertain the grounds of the judgment or decree."

The present appellant appended to its jurisdictional statement only the opinion of the Supreme Judicial Court in this cause. As more fully appears from the first para-

graph of Part IV of the appellant's jurisdictional statement, the Supreme Judicial Court in that opinion cited *Old Colony Railroad Co.* v. *Assessors of Boston*, 309 Mass. 439, and *Lincoln Hotel Co.* v. *Assessors of Boston*, 317 Mass. 505, and then said: "We remain satisfied with those decisions, which are decisive as to the present objection raised by the respondent." We respectfully suggest that reference to those opinions is necessary to ascertain the grounds of the present decision.

The appellant also failed to append the decision of the Land Court in the case at bar. That decision read in part as follows:

> "The respondents contend that they have been barred from obtaining any review by the Appellate Tax Board as to the validity and amount of the assessments for the years 1938 and 1939. They state that they do not argue that Chapter 478 of the Acts of 1938 is unconstitutional. In fact they concede that the Supreme Judicial Court in *Old Colony Railroad Company* v. *Assessors of Boston*, 309 Mass. 439 and *Lincoln Hotel Company* v. *Assessors of Boston*, 317 Mass. 505, have held this chapter to be constitutional. They further argue, however, that 'they do not wish to be understood as conceding the constitutionality of the statute' and say: 'If it is material in any way in this case, we earnestly contend that it violates the "due process" and "equal protection" provisions of the fourteenth amendment to the Constitution' " (R. p. 29).
>
> • • • • • • •
>
> "Thus the evidence which was introduced tending to prove that Marden & Murphy, Inc. was unable to comply with the provisions of St. 1938, c. 478, s. 3 as to payment is immaterial. If it should be material, however, it cannot be found as a fact on all the evidence that Marden & Murphy, Inc. was unable to comply with the provisions of said statute as to payment. Exhibits 89 and 90 are statements of condition of Marden &

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Murphy, Inc. for various months in 1938, 1939 and 1940. An examination of these statements discloses that from the cash on hand alone, without considering the other assets of the corporation, the provisions of the statute in regard to payment as to parcels 2 and 3 could have been complied with, and that from the other assets of the corporation arrangements might have been made to secure the necessary money to comply with the provisions of the statute in regard to payment as to parcel 1" (R., pp. 29, 30).

In that portion of appellant's jurisdictional statement headed "Appellant's Contentions Below and the Rulings Thereon", the appellant more than once mentions its inability to make the payments required by St. 1938, c. 478. It is obvious that these statements are not in conformity with the Land Court's findings just quoted. We therefore respectfully urge that reference to the Land Court's opinion is necessary to ascertain the grounds of its decree and consequently that under the Rule quoted the Land Court's opinion should have been appended to the appellant's jurisdictional statement.

VI

**Appellee's motion to dismiss or affirm should be allowed insofar as the appeal relates to St. 1938, c. 478, because the jurisdictional statement fails to show that the appellant is one of the class affected by that statute.**

It is established that one who assails a statute as unconstitutional must show that he is injuriously affected thereby. *Mallinckrodt Works* v. *St. Louis*, 238 U. S. 41, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531, 544. As just stated under V, the Land Court said: "* * * it cannot be found as a fact on all the evidence that Marden & Murphy, Inc. was unable to comply with the provisions of said statute as to payment" (R., p. 30). Under the circum-

stances, we suggest, the appellant has not shown that it has been injuriously affected by the conditions as to payment imposed by St. 1938, c. 478.

## VII

**Appellee's motion to dismiss or affirm should be allowed in so far as the appeal relates to St. 1938, c. 478, because the Federal question involved is not substantial for that the requirements of the Fourteenth Amendment have been satisfied in the instant case by the statutes providing for a hearing before the Assessors of Lowell.**

It is important to note that, so far, at least, as the appellant is concerned, the conditions precedent to an application to the local assessors for an abatement are materially different from those precedent to an appeal to the Appellate Tax Board. The appellant was not required to pay the tax, or any part of it, before applying to the appellee for an abatement. Mass. G.L. (Ter. Ed.) c. 59, s. 59, and amendments thereto; see also *Boston Five Cents Savings Bank* v. *Assessors of Boston*, 313 Mass. 762, 767.

The requirement of due process is that, after such notice as may be appropriate, the taxpayer have an opportunity to be heard as to the validity of a tax and the amount thereof by giving him the right to appear for that purpose at some stage of the proceedings before the tax is irrevocably fixed. *McGregor* v. *Hogan*, 263 U. S. 234, 237. As previously stated in Massachusetts, several remedies are available to a taxpayer whose complaint is that a tax is wholly illegal (*Wynn* v. *Assessors of Boston*, 281 Mass. 245, 248); but the exclusive remedy for overassessment is by application for abatement (*Lynch* v. *Boston*, 313 Mass. 478, 479; *Hairenik Association, Inc.* v. *Boston*, 313 Mass. 274, 278). Due process, therefore, requires that at some stage of the statutory proceeding for abatement the tax-

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payer have an opportunity to be heard in order to preserve his constitutional right to a hearing as to the amount of the tax. The requirement of due process is satisfied, however, if the statute providing for an ad valorem tax also provides for a hearing before the assessing board. *Pittsburgh, Cincinnati, Chicago, and St. Louis Railway Co.* v. *Backus*, 154 U. S. 421. Massachusetts statutes so provide. In *Assessors of Brookline* v. *Prudential Insurance Co.*, 310 Mass. 300, the Supreme Judicial Court of Massachusetts said, (p. 310):

> "We think that the statutes regulating proceedings for abatement of taxes are to be construed as contemplating hearings before the assessors upon applications for abatement."

To the same effect is *Eastern Racing Association, Inc.* v. *Assessors of Revere*, 300 Mass. 578. In that case, the petitioner argued that the only question for determination was whether the provisions of Mass. G.L. (Ter. Ed.) c. 58A, s. 6, as amended by Mass. St. 1933, c. 167, s. 4, relieved the Assessors of Revere of the duties laid upon them by Mass. G.L. (Ter. Ed.) c. 59. 300 Mass. 578, 580. It was held (p. 581):

> "• • • the provisions of G. L. (Ter Ed.) c. 58A, as amended, were not intended to relieve the commissioner and board of assessors from the duties imposed upon them by G. L. (Ter Ed.) c. 59, as amended, in the matter of entertaining, hearing and deciding applications for abatement of taxes filed with them in due course, and that under the first statute referred to it was not contemplated that boards of assessors would not ordinarily perform these duties within the time fixed by law."

The *Eastern Racing Association* case was decided on June 28, 1938. St. 1938, c. 478, was not enacted until July 1, 1938. That case is, therefore, not authority for the proposition that a writ of mandamus would not issue since

the enactment of St. 1938, c. 478. Although the present appellant filed applications for abatement with the Assessors of Lowell for the years 1938 and 1939, there is no evidence that it made any effort to get a hearing before the Assessors. If, as the appellant contends, the appellate remedy provided by St. 1938, c. 478, is not constitutionally adequate, a petition for a writ of mandamus plainly would lie but the appellant did not see fit to file such a petition. Rather, the appellant slept upon its alleged constitutional rights until it filed its answer in the Land Court on January 26, 1945. (R., pp. 4-9.) If the appellant had petitioned for a writ of mandamus and the local assessors had in defense relied on St. 1938, c. 478, on the ground that it provided an adequate statutory remedy, plainly the constitutionality of St. 1938, c. 478, would have been directly in issue, and could have been brought ultimately to this Court upon appeal.

At the risk of being repetitious, we should like to call attention to still another case—*Harrington* v. *Glidden*, 179 Mass. 486. In that case the Court commenced its opinion by noting (p. 490) that in Massachusetts, assessors are public officers whose duties are of a *quasi* judicial nature, and then towards the end said (p. 495):

> "The defendant's brief contains an elaborate argument in support of the proposition that our statutes relating to the assessment of taxes are unconstitutional because they do not give the party assessed opportunity to be heard. But he does have full opportunity to be heard before the assessing board, if he desires it, before the demand becomes conclusively established against him, and that is enough. Coley, Taxation, 361, 363, 364, and cases cited."

The judgment of the Massachusetts Court in that case was affirmed by this Court. *Glidden* v. *Harrington*, 189 U. S. 255.

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As previously stated, St. 1938, c. 478, imposed conditions merely upon appeals to the Appellate Tax Board, not upon abatement proceedings before the assessors. In view of the decision in *Glidden* v. *Harrington*, 189 U. S. 255, and the Massachusetts cases quoted, the statutory provisions for proceedings before the assessors are alone enough to satisfy the requirements of the Fourteenth Amendment. We, therefore, respectfully urge that insofar as the appeal now before this Court relates to St. 1938, c. 478, it presents no substantial Federal question, the requirements of the Fourteenth Amendment having been satisfied by these statutory provisions.

## VIII

**Appellee's motion to dismiss or affirm should be allowed insofar as the appeal relates to St. 1938, c. 478, because the Federal question involved is not substantial for that it has long been settled that there is nothing unconstitutional or even harsh in requiring a person assessed to pay a tax before litigating its legality or amount.**

Appellant's claim that St. 1938, c. 478, violates its constitutional rights is untenable under *Tennessee* v. *Sneed*, 96 U. S. 69, and *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589.

In *Tennessee* v. *Sneed*, 96 U. S. 69, 75, it was said:

> "In revenue cases, whether arising upon its internal revenue laws or those providing for the collection of duties upon foreign imports, it (the United States) adopts the rule prescribed by the State of Tennessee. It requires the contestant to pay the amount as fixed by the government, and gives him power to sue the collector, and in such suit to test the legality of the tax. There is nothing illegal or even harsh in this. It is a wise and reasonable precaution for the security of the government. No government could exist that permitted the collection of its revenues to be delayed

by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs."

In *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 599, this Court said:

> "It is argued that such review by the Board of Tax Appeals and Circuit Court of Appeals is constitutionally inadequate because of the conditions and limitations imposed. Specific objection is made to the provision that the collection will not be stayed while the case is pending before the Circuit Court of Appeals, unless a bond is filed. . . . As to the first of these objections, it has already been shown that the right of the United States to exact immediate payment and to relegate the taxpayer to a suit of recovery, is paramount. The privilege of delaying payment pending immediate judicial review, by filing a bond, was granted by the sovereign as a matter of grace solely for the convenience of the taxpayer. . . ."

The appellant in the case at bar apparently has sought to draw a fine line of distinction between the right of the Commonwealth of Massachusetts to refuse to stay collection of the tax and the right to make payment of the tax, or a part thereof, a condition precedent to an appeal to its Appellate Tax Board after adverse action by the assessors on an application for abatement. That the right to collection of the tax regardless of a pending appeal is permissible under the Constitution of the United States has long been established. *Cheatham* v. *United States*, 92 U. S. 85, 89. *Tennessee* v. *Sneed*, 96 U. S. 69, 75. *Springer* v. *United States*, 102 U. S. 586, 594.

On this point, the *Phillips* case said, at page 596:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judi-

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> cial determination of the liability is adequate. . . . Delay in the judicial determination of property rights is not uncommon when it is essential that government needs be immediately satisfied."

There can be no question but what the statute in the instant case afforded the taxpayer the right to a hearing before the valuation became final. It was said in *McGregor* v. *Hogan*, 263 U. S. 234 at 237:

> "It is not essential to due process of law that the taxpayer be given notice and hearing before the value of his property is originally assessed, it being sufficient if he is granted the right to be heard on the assessment before the valuation is finally determined."

It will be noted that the statute in the instant case provided for refund, with interest, to the taxpayer of the amount of over-assessment, if any. It is provided in Section 1 of the said statute as follows:

> "If upon hearing it appears that the complainant has complied with all applicable provisions of law and the appellate tax board finds that the complainant is duly entitled to an abatement, it may grant him such reasonable abatement as justice may require, and shall enter an order directing the treasurer of the town to refund said amount, if the tax sought to be abated has been paid, together with all charges and interest at five per cent on the amount of the abatement from the date of the payment of the tax. The board may make such order with respect to the payment of costs as justice may require."

Thus, even if it paid all the tax as assessed, before the appeal was entered in the Appellate Tax Board, the appellant was afforded full benefit of the ultimate determination of the amount of the tax. There can be no tenable distinction between the payment of the tax, even if there has been an overassessment followed by refund, and the neces-

sity of posting a bond as in the *Phillips* case and in the case of *Nickey* v. *Mississippi*, 292 U. S. 393.

In the *Nickey* case, it will be noted that the only opportunity for a contest on the tax afforded the taxpayer was as a defense to a proceeding to enforce the same and this was held to be no violation of the Fourteenth Amendment to the Constitution, even though it entailed a necessity of the taxpayer's filing a bond to lift an attachment upon his land.

The fallacy of any contention that the appellant had a right to appeal without paying the tax lies in the necessity for arguing that the taxpayer has a constitutional right to withhold payment of a tax until it has been finally adjudicated. That, as we have seen is contrary to long-established custom and law. It follows that in those situations where the governmental authority has for one reason or another refrained from pressing for immediate collection of the tax, the Legislature of Massachusetts can provide in any way it wishes as to how far it will allow a taxpayer who is immediately liable for taxes, to have them reviewed without being required to pay them in full. It may do this by allowing the taxpayer to have a review when only part of the tax has been paid; or when a certain amount has been paid; or by filing a bond for security. A plea of financial inability of the taxpayer to meet these conditions will not avail. In *McMillen* v. *Anderson*, 95 U. S. 37, the Court considered a statute of Louisiana which allowed the collector of taxes to seize property of a delinquent taxpayer. A judgment was rendered in favor of the collector and, on appeal to this Court, counsel for the taxpayer argued as follows, (page 40):

> "The plaintiff (taxpayer) was not permitted under the law of Louisiana to contest the claim of the State, until he had given security for the payment of costs and penalties, as a condition for having a hearing. The law, therefore, establishes one rule for the rich and

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another for the poor. He who has neither wealth, nor wealthy friends to become his sureties, is not allowed a hearing under any circumstances. This is not due process of law."

The Court affirmed the judgment for the defendant, and in its opinion said, (page 41):

"Looking at the Louisiana statute here assailed—the act of March 14, 1873,—we feel bound to say, that, if it is void on the ground assumed, the revenue laws of nearly all the States will be found void for the same reason. The mode of assessing taxes in the States by the Federal Government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done.

"But that does not mean, nor does the phrase 'due process of law' mean, by a judicial proceeding. The nation from whom we inherit the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation. . . .

"Here is a notice that the party is assessed, by the proper officer, for a given sum as a tax of a certain kind, and ten days' time given him to pay it. Is not this a legal mode of proceeding? It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax. And the fact that most of the States now have boards of revisers of tax assessments does not prove that taxes levied without them are void."

The Court in the above case further held that whether or not other means were open to the taxpayer to contest

the tax, the remedy of injunction as invoked by the taxpayer was sufficient. It then said:

> "But it is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue."
>
> "It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by Legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another."

It will be noted that in the above case the taxpayer became liable for *double the amount of the tax and costs.*

The taxes of the appellant in the case at bar were, at the time of its appeals to the Appellate Tax Board, presently due and payable, and it was the duty of those in charge of its affairs to pay them. It could hardly be said that the appellant had any constitutional right not to pay the taxes. Nor did it have a right to a final determination of the amount of the taxes before being required to pay them. Therefore, St. 1938, c. 478, by making the payment of all or part of each tax a condition precedent to the obtaining of a review by that Board, did not deprive the appellant of any constitutional right.

In view of the various cases hereinbefore cited, which, we submit, have established the constitutional right of a state legislature to require a person assessed to pay a tax before litigating its legality or amount, we respectfully urge that St. 1938, c. 478, presents no substantial Federal question.

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## Conclusion

For the various reasons set forth above, it is submitted that appellee's motion to dismiss or affirm should be allowed with costs to the appellee.

Respectfully submitted,

CITY OF LOWELL,
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